

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIONEL LAMONT JOHNSON,

Defendant-Appellant.

UNPUBLISHED

March 20, 2012

No. 302577

Montcalm Circuit Court

LC No. 10-013429-FH

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on two counts of knowingly owning or possessing fighting animals, MCL 750.49(2)(a), one count of knowingly owning, possessing, or using devices or equipment in the training, fighting, or baiting of an animal, MCL 750.49(2)(h), and one count of animal cruelty to at least four, but less than ten, animals, MCL 750.50(4)(c). We affirm.

On September 16, 2008, in response to several complaints, law enforcement officers went to defendant's house which was located at the end of a dead end, two-track road in a remote area. The officers found that defendant housed pit bulls in 12 individual cages lined up along a wall in his garage. The garage was dark, the cages were stacked on top of each other, and the doors to all of the cages were facing towards and against the garage wall. One pit bull was also found chained in the back yard. Subsequently, on February 24, 2009, a search warrant was executed at defendant's house. Seven pit bulls were found behind the house and they were wearing weighted, wide collars that were attached to heavy log chains which were hooked to 55 gallon drum barrels, typical for muscle conditioning. There was snow on the ground and it was cold. Upon examination, most of the dogs were found to have scarring on their faces and front legs, and some had sores, wounds, broken teeth, and bruised toe nails. Upon inspection of the house, intravenous equipment with needles, bloody dog crates, wound care products, and a book about conditioning dogs for fighting were found. Documents evidencing dog-fighting were also found, including a "dog-fighting match" agreement. Underground dog-fighting publications, including some which referenced "Crime Side Kennels" was uncovered. Defendant's well-known nickname was "Crime Side." Thereafter, defendant was charged with three counts of violating the dog-fighting statute, MCL 750.49, as well as one count of animal cruelty, MCL 750.50(4)(c). He was convicted by a jury as charged. This appeal followed.

First, defendant argues that he was denied the effective assistance of counsel for several reasons, including that his counsel failed to call three particular witnesses to testify, failed to question his ex-wife about the voluntariness of her testimony, and failed to file a pretrial motion challenging the validity of the search warrant. We disagree.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Here, our review is limited to errors apparent on the record because a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), was not held. See *Jordan*, 275 Mich App at 667.

Defendant first claims that his counsel was ineffective because he failed to call as a witness David Reed, who would have testified that defendant "paid him and he routinely fed and took care of the animals at issue in this case." Similarly, defendant claims that his counsel should have called the veterinarian who had previously treated the animals to testify "as to the condition and health of the dogs." And defendant argues that a representative of the hospital where he "was treated for part of the time in question" should have been called as a witness. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). And, here, defendant's charges were not premised on his alleged failure to feed and care for the pit bulls. That is, there was no claim that his dogs were malnourished or dehydrated. In fact, keeping the dogs well-nourished and in a good state of health was likely necessary for defendant's success in the "dog-fighting business," which was the criminal conduct in which he was alleged to be actively engaged. Thus, defendant's failure to call these three purported witnesses did not deprive him of a substantial defense as he appears to claim.

Defendant also argues that his attorney was ineffective because he failed to question defendant's ex-wife "as to the voluntariness of her testimony, when it was obvious that her testimony was not voluntary." However, defendant fails to set forth any reasoning in support of this claim and we will not attempt to discover and rationalize the basis for the claim; thus, this claim is deemed abandoned. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant further argues that his attorney was ineffective for failing to file a pretrial motion to challenge the validity of the search warrant. Again, defendant fails to set forth any reasoning in support of this claim and we will not attempt to discover and rationalize the basis for the claim; thus, this claim is also deemed abandoned. See *Payne*, 285 Mich App at 195.

Accordingly, defendant's ineffective assistance claim is wholly without merit. Defendant has failed to establish that his counsel's performance was deficient and the deficiency resulted in prejudice to defendant. See *Jordan*, 275 Mich App at 667.

Second, defendant argues that his Fourth Amendment rights against unreasonable search and seizure were violated because the affidavit supporting the search warrant "is nonexistent;"

thus, probable cause did not exist to justify the search. However, the affidavit dated February 24, 2009 did, in fact, exist and has been provided to this Court; thus, this issue is without merit.

Third, defendant argues that his ex-wife's testimony was inadmissible "as a violation of the spousal privilege." However, in his argument, defendant also references the marital communication privilege; thus, it appears that he is challenging the admission of his ex-wife's testimony as a violation of both privileges. Because defendant did not raise these issues in the trial court, our review is for plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The spousal privilege, MCL 600.2162(2), precludes one spouse from testifying against the other spouse and applies only if the marriage exists at the time of trial. *People v Fisher*, 442 Mich 560, 568-569; 503 NW2d 50 (1993). Here, it is uncontested that defendant was divorced from his testifying ex-spouse at the time of trial; thus, the spousal privilege did not apply. The marital communication privilege, MCL 600.2162(7), survives divorce and "provides that neither spouse may 'be examined' with respect to any communication made by one to the other during the marriage." *Fisher*, 442 Mich at 575, citing MCL 600.2162. Here, defendant fails to cite to any instance during his ex-wife's testimony where she was "examined" regarding any communication she had with defendant during the marriage. Thus, defendant has failed to properly argue the merits of his assertion of error which constitutes abandonment of the issue. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant also claims that his ex-wife was improperly "sworn under the adverse witness statute." The trial transcript does state that defendant's ex-wife was sworn as a witness under the adverse witness statute. However, there is no indication in the record that the prosecution requested to have her sworn as an adverse witness under MCL 600.2161. Thus, it appears to have been merely a clerical mistake. In any case, defendant has failed to establish plain error warranting appellate relief with regard to this unpreserved claim. See *Carines*, 460 Mich at 763-764.

Fourth, defendant argues that the testimony of Special Agent Jeffrey Nickols was improperly admitted as "expert testimony;" thus, he is entitled to a new trial. We disagree. Because this issue is raised for the first time on appeal, our review is for plain error affecting defendant's substantial rights. See *id.*

Special Agent Nickols provided extensive trial testimony in this case pertaining to both general information about dog-fighting, as well as his involvement in the investigation of this case. It appears that defendant is challenging the admission of his general testimony regarding dog-fighting. To the extent that such testimony may be deemed "expert" testimony, MRE 702, the fact that Special Agent Nickols was not formally qualified as an expert witness by the trial court does not constitute plain error affecting defendant's substantial rights. Special Agent Nickols testified that he was a special agent with the United States Department of Agriculture, Office of Inspector General, and had been since March of 2008. In that capacity he had investigated numerous animal cruelty violations. Special Agent Nickols also had been in law enforcement for 12 years, including as a police officer and agent with the United States Secret Service. As a special agent for the Department of Agriculture, he had received extensive training through the agency itself, as well as the Humane Society and other animal groups, regarding

animal cruelty, including “the underground dog fighting society.” Special Agent Nickols indicated that he had also previously testified for the prosecution in numerous federal and state cases involving animal cruelty. Accordingly, defendant has failed to establish that the admission of the contested testimony constituted plain error warranting appellate relief. See *Carines*, 460 Mich at 763-764; see, also, *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007).

Fifth, defendant argues that the cumulative effect of several errors warrants a new trial. Because defendant has failed to establish any such errors this issue is without merit.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Henry William Saad